No. 35.

Appx. to Brf. of Catron for Appe

UNITED STATES, APPELLEE,

Filed Oct. 16, 1899.

CLARENCE P. ELDER ET AL.

Office Supreme Court U. S.
OCT 16 1899
JAMES H. MCKENNEY,
Clerk.

Appellants' Addition to Point 1, Page 9, of Brief, Containing Various Forms of Grants Made by Governors in New Mexico from 1820 to 1846.

Considering this whole decree in connection with the petition, no other conclusion can be reached than that the Governor did thereby accede to the petition, that means the *whole* of the petition; what was stated in it by recital, as well as to what was prayed in it in behalf of the petitioner. In referring the matter to the Prefect, there is no word used to express "refer" or "directed," as we insert in *italics* at the end of our translation, but the words used are simply "al prefecto," meaning to the Prefect. This is a form that was very often used by Armijo and other governors. We will here mention a few instances of this way of making a grant, showing that it was customary in New Mexico, from 1820 to 1846, to use some such language.

In claim No. 25 John Lamy, which was the grant made August 20, 1820, and was confirmed by Congress, the granting clause was as follows: "Al Alcalde constitucional de la Eleccion para que obre con arreglo de lo respectivo a los de fuero ordinario dirijiendo nota de los del fuero de guerra a este gobierno con los documentos correspondientes para obrar como corresponda."

Which, translated literally, is as follows: "To the constitutional justice of first election, who will act according to law in reference to ordinary privileges, transmitting to this

government a note of those entitled to privileges of war, together with the corresponding documents, in order that the necessary steps be taken." That was treated as a grant, and it was understood in that, as well as in many other grants, that the words "al alcalde," or "al juez," should be preceded by the words, "granted as prayed for," and referred to the Prefect. Those words were understood.

In the grant to the people of Chillili, which was made in the year 1841 by Armijo, Governor, and in Spanish was as follows:

"Al sor. juez de la pra. Instancia del 3er. distrito judicial D. Ant. Sandoval, para que en atencion a la pobreza que es notoria tienen los solisitantes y que este Gobierno esta bien informado y dicho juez pondra en posesion segura a los solistantes del terreno que solisitan," etc., which, translated, is as follows:

"To Don Antonio Sandoval, justice of the first appointment of the third judicial district: That, taking into consideration the well-known poverty of the petitioners, and that this government is well informed of the fact, said justice will place the petitioners in secure possession of the land they ask for, etc."

This was a grant, and the words were understood as follows: "*Granted as asked and directed to, etc.*"

In the grant of Pedro Armendariz, made in June, 1820, the decree of Governor Mulgarus was in the following words:

"Respecto de que no creo in conveniente, como lo pide bajo las condiciones del decreto de balverde," which is translated "as it is not deemed inconvenient, as he requests, under the same conditions of the decree of Balverde." This was held to be a good grant, as was also that of Chillili. The words "granted as prayed for" were understood to be included before the words "as he requests." The three grants mentioned were confirmed by Congress after being favorably decided by the Surveyor General. In 1843 a

grant was made to Vigil and St. Vrain, on December 9, and was in the following language:

"Al quez de paz a que corresponde para que de la posesion a que se refieren los presentates pues este Gobno. Desea que se fomente la agricultura y las artes," which was translated nearly the same language as our grant except not as strong.

"To the justice of the peace of the proper jurisdiction, who will give the possession referred to by the petitioner, as this government desires to encourage agriculture and the arts." The words "granted as prayed for" being understood as preceding the words "to the justice, etc."

The grant to the town of Tijique was made in about the same language, and made in 1834; it and the one preceding it were both confirmed by Congress and by the Surveyor General.

In 1843 Armijo, on December 30, made a grant to Lee and Baubien in the following language:

"Pase al prefecto para que si el terreno que si solicita no tiene embaraso aga que se de la posesion a que se refieren los presentantes," which is translated as follows:

"Referred to the prefect, in order that if the land petitioned for be not otherwise disposed of, he cause the possession referred to by the petitioners to be given." This grant was approved by the Surveyor General and confirmed by Congress, and embraced in it over 800,000 acres. This is almost the same language as our grant except that possession is ordered, while in ours "the possessions," meaning lands, is ordered.

On May 7, 1846, less than a month prior to the making of the grant in question, a grant of five leagues was made by Armijo to John Scolly and others, and the granting decree as translated reads as follows:

"To the justice of Las Vegas: That he may proceed to place the petitioners in possession, setting apart such lands for cultivation as they may be able to cultivate," etc.

It was understood that the words "granted as prayed for" were intended to precede the reference to the justice of the peace. That grant was also approved by the Surveyor General and confirmed by Congress.

The foregoing selections have been made so as to cover the period between the Mexican revolution and the cession of New Mexico to our government. There are many others of the grants during that period which were made by the same words, none of them using the word grant, but simply stating, "to the justice of the peace or alcalde," as the case might be. Those people receiving the grant were always respected from the dates thereof as the sole and exclusive owners thereof, and the Surveyor General decided that they were good and valid grants in favor of the grantees, and segregated the lands from the public domain. Each one of those before referred to specifically was confirmed by the act of Congress dated June 21, 1860. They have been cited because they have been adjudicated by the Surveyor General and acted upon by Congress, and are in a condition that this court will take judicial notice of them. And they are here referred to to show the court what the customary form of grant in New Mexico was, and that they were in question while under consideration, and were as full as that custom required.

This seems to have been a form of grant which very extensively prevailed in New Mexico, even under the Spanish regime. It is true that all of the grants were not in this form. Some of them were very full and complete. Some of them were even less exact in their language than these cited. The counsel for appellant claims that this grant under consideration was only a grant of the possession of the land, but the grant and the petition, all the authorities say, must be construed together to ascertain the meaning, and when taken in connection with the language of the regulation correctly translated, including a correct translation of this

decree, it is difficult to see how a mere *possession only* was given (Youtz *vs.* U. S., 23 How., 498). It is not to be supposed that the Governor would act outside of the purview of every law. There was no law which authorized or justified the giving, by grant, of a mere possession. In California, there a few cases where the Governor permitted a party to search for lands, such as he might need, but required him to report to the executive and file the requisite papers or petition for a grant if he should find such lands. But nowhere, it is believed, can it be found that they went to the trouble of granting a mere possession. Evidently the petitioner in this case wanted the land. He solicited the land, and asked that it be granted to him. Gave his name, his residence, and his nationality, and what he was doing, and wished to do, showing that he was taking steps directly under the provisions of the regulations for making grants, and not for the purpose of acquiring an uncertain and indefinite possession.

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